

**A Abdul Rashid bin Mohamad Isa v PTT International Trading
Pte Ltd**

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 03-2-11 OF
2023(B)
NALLINI PATHMANATHAN, HASNAH HASHIM AND ABDUL
KARIM FCJJ
9 JULY 2024

C *Bankruptcy — Creditor’s petition — Withdrawal of — Registrar decided since
judgment creditor withdrawn creditor’s petition, bankruptcy action against
judgment debtor came to end — High Court allowed judgment creditor’s appeal*
D *— Appeal by judgment debtor against High Court’s decision — Whether
withdrawal of creditor’s petition would terminate and end bankruptcy proceeding
against judgment debtor*

E On 17 December 2018, the judgment creditor (‘JC’) served a bankruptcy
notice to the judgment debtor (‘JD’) for an amount of RM59,567,505.93, and
the JD had seven days from the date of its service to reply and make payment.
The JD filed a summons in chambers to set aside the bankruptcy notice but did
not file any affidavit under r 93(1) of the Insolvency Rules 2017 (‘IR’). The
learned registrar found that the JD had committed an act of bankruptcy on
F 25 December 2018 because the JD did not file any affidavit and did not make
any payment of the outstanding sum stated in the bankruptcy notice to the JC.
Consequently, the JD filed an appeal to the judge in chambers against the
decision while the JC filed a creditor’s petition against the JD. The learned
High Court judge (‘HCJ’) allowed the JD’s appeal and held that there was no
G act of bankruptcy because the JD had already applied to set aside the
bankruptcy notice. The JC thus decided to withdraw the creditor’s petition.
The learned registrar allowed the JC’s application to withdraw the creditor’s
petition with the liberty to file afresh. However, the learned registrar also
decided that: (a) since the JC had withdrawn the creditor’s petition, the
H bankruptcy action against the JD came to an end; and (b) the JC was already
out of time to file any creditor’s petition since the act of bankruptcy had
occurred on 25 December 2018. Aggrieved, the JC filed an appeal to the judge
in chambers while the JD applied to set aside the JC’s appeal. The HCJ had
allowed the JC’s appeal and dismissed the JD’s application. Hence, this appeal.
I The issue for determination was whether the HCJ had erred in fact and law in
failing to appreciate that the withdrawal of the creditor’s petition would
terminate and end the bankruptcy proceeding against the JD.

Held, dismissing the appeal with costs:

- (1) Even though the amount stated in the bankruptcy notice was not paid within seven days, an application to set aside the bankruptcy notice under r 17 of the IR was already filed by the JD before 25 December 2018 through encl 6. The act of bankruptcy did not occur on 25 December 2018, as there was a pending application to set aside the bankruptcy notice. This was regardless of whether the application was made under r 17 of the IR or otherwise since it came within the ambit of r 93 of the IR. Therefore, the act of bankruptcy could not occur until encl 6 was heard and disposed of. Since encl 6 had not been heard and disposed of, the act of bankruptcy had been stayed according to r 93 of the IR and thus it was premature at this stage to argue that the bankruptcy proceeding had terminated especially when the earlier petition was withdrawn with liberty to file afresh (see paras 23 & 26–27).

[Bahasa Malaysia summary]

Pada 17 Disember 2018, pemiutang penghakiman ('JC') menyampaikan notis kebangkrutan kepada penghutang penghakiman ('JD') untuk jumlah RM59,567,505.93, dan JD mempunyai tujuh hari dari tarikh penyampaian untuk menjawab dan membuat bayaran. JD memfailkan saman dalam kamar untuk mengetepikan notis kebangkrutan tetapi tidak memfailkan sebarang affidavit di bawah k 93(1) Kaedah-Kaedah Insolvensi 2017 ('KI'). Pendaftar yang bijaksana mendapati JD telah melakukan tindakan kebangkrutan pada 25 Disember 2018 kerana JD tidak memfailkan sebarang affidavit dan tidak membuat sebarang pembayaran jumlah tertunggak yang dinyatakan dalam notis kebangkrutan kepada JC. Akibatnya, JD memfailkan rayuan kepada hakim dalam kamar terhadap keputusan itu manakala JC memfailkan petisyen pemiutang terhadap JD. Hakim Mahkamah Tinggi yang bijaksana ('HMT') membenarkan rayuan JD dan memutuskan bahawa tiada tindakan kebangkrutan kerana JD telah pun memohon untuk mengetepikan notis kebangkrutan. JC dengan itu memutuskan untuk menarik balik petisyen pemiutang. Pendaftar yang bijaksana membenarkan permohonan JC untuk menarik balik petisyen pemiutang dengan kebebasan untuk memfailkan semula. Walau bagaimanapun, pendaftar yang bijaksana juga memutuskan bahawa: (a) memandangkan JC telah menarik balik petisyen pemiutang, tindakan kebangkrutan terhadap JD telah berakhir; dan (b) JC sudah kesuntukan masa untuk memfailkan mana-mana petisyen pemiutang kerana tindakan kebangkrutan telah berlaku pada 25 Disember 2018. Terkilan, JC memfailkan rayuan kepada hakim dalam kamar manakala JD memohon untuk mengetepikan rayuan JC. HMT telah membenarkan rayuan JC dan menolak permohonan JD. Oleh itu, rayuan ini. Isu untuk penentuan adalah sama ada HMT telah terkhilaf dalam fakta dan undang-undang kerana gagal untuk menghargai bahawa penarikan balik petisyen pemiutang akan menamatkan dan mengakhiri prosiding kebangkrutan terhadap JD.

Diputuskan, menolak rayuan dengan kos:

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(1) Walaupun jumlah yang dinyatakan dalam notis kebangkrapan tidak dibayar dalam tempoh tujuh hari, permohonan untuk mengetepikan notis kebangkrapan di bawah k 17 KI telah pun difailkan oleh JD sebelum 25 Disember 2018 melalui lampiran 6. Tindakan kebangkrapan tidak berlaku pada 25 Disember 2018, kerana terdapat permohonan belum selesai untuk mengetepikan notis kebangkrapan. Ini tidak kira sama ada permohonan itu dibuat di bawah k 17 KI atau sebaliknya kerana ia datang dalam lingkungan k 93 KI. Oleh itu, tindakan kebangkrapan tidak boleh berlaku sehingga lampiran 6 didengar dan dilupuskan. Oleh kerana lampiran 6 tidak didengar dan dilupuskan, tindakan kebangkrapan telah ditangguhkan mengikut k 93 KI dan oleh itu adalah terlalu awal pada peringkat ini untuk berhujah bahawa prosiding kebangkrapan telah ditamatkan terutamanya apabila petisyen terdahulu ditarik balik dengan kebebasan untuk memfailkan semula (lihat perenggan 23 & 26–27).]
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Cases referred to

Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 2 MLJ 298, SC (folld)

Hong Leong Bank Bhd v Khairulnizam bin Jamaludin [2016] 4 MLJ 302, FC (distd)
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Ng Kai Tee, ex parte CIMB Bank Bhd, Re (Bankruptcy Proceedings No 29–71 of 2009–11) (unreported) (refd)

Subramaniam all Paidathally; ex parte G Ragumaren & Co, Re [2011] MLJU 1216; [2011] 1 LNS 1594, HC (distd)

V Gopal, Re: ex p; Bank Buruh (M) Bhd [1987] CLJ Rep 602, HC (refd)
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Legislation referred to

Bankruptcy Act 1967 (now Insolvency Act 1937) ss 3(1)(i), 5, 5(3), 6(7)

Insolvency Rules 2017 r 93
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Appeal from: *Abdul Rashid bin Mohamad Isa v PTT International Trading Pte Ltd* [2024] 4 MLJ 187 (Court of Appeal, Putrajaya)

Chan Siew Cheong (with Chen Jia Yee) (Teh & Lee) for the appellant.

Alvin Julian (with Neo Chi Chyn) (Firoz Julian) for the respondent.
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Nallini Pathmanathan FCJ:

[1] The core issue in this appeal is whether the withdrawal of the creditor’s petition will terminate all bankruptcy proceedings including the bankruptcy notice. This is reflected in the questions of law put forward for our consideration.

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SALIENT FACTS

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[2] The chronology of events discloses the following salient facts:

- (a) the bankruptcy notice was issued on 17 December 2018;
- (b) without any application to set aside the bankruptcy notice the act of bankruptcy would have occurred on 25 December 2018;
- (c) however, prior to 25 December 2018, the judgment debtor filed an application to set aside the bankruptcy notice under r 93 of the Insolvency Rules 2017;
- (d) the Registrar ruled that the application to set aside in encl 6 was inadequate in that there was no affidavit in support and did not deal with it. Instead, the Registrar held that an act of bankruptcy occurred on 25 December 2018, as if no application to set aside was before the court;
- (e) accordingly the judgment creditor went on to file a creditor's petition;
- (f) on the judgment debtor's appeal to the judge in chambers, the learned judge set aside the declaration of an act of bankruptcy holding, as per r 93 that as the setting aside application had not been heard, no act of bankruptcy could occur. It is not in issue that at the time of the hearing before the Court of Appeal the setting aside application in encl 6 had not been heard; and
- (g) at the hearing of the creditor's petition before the Registrar, matters were compounded further when the Registrar allowed the judgment creditor to withdraw the creditor's petition with liberty to file afresh, but then went on to rule that all bankruptcy proceedings stood terminated by reason solely by reason of the withdrawal.

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[3] By this stage therefore two glaring issues required clarification — Firstly whether an act of bankruptcy could be declared despite the failure to dispose of the application to set aside the bankruptcy notice; and secondly, within this unique context, whether the creditor's petition could be withdrawn with liberty to file afresh, given that it had been filed as a consequence of the earlier erroneous ruling by the Registrar that an act of bankruptcy had occurred. This erroneous ruling was correctly reversed by the High Court.

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[4] In these circumstances it follows that as there was no act of bankruptcy that could be relied on, pending the disposal of the application for the setting aside of the bankruptcy notice, there could be no basis on which to file a creditor's petition. Accordingly, the judgment creditor asked that the creditor's petition be withdrawn with liberty to file afresh. However, the Registrar, while allowing the application for the creditor's petition to be withdrawn *with liberty to file afresh*, went on to rule that all bankruptcy proceedings stood terminated.

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A It is unclear on what legal basis the Registrar so determined, given that there was no clear act of bankruptcy at that point in time, as the setting aside application in encl 6 had not been heard.

B [5] The High Court and the Court of Appeal, with respect, correctly held that the *setting aside application under r 93* stood to be heard, and that the declaration of the act of bankruptcy as occurring on 25 December 2018 by the Registrar was erroneous. As it is erroneous, it follows that there is no act of bankruptcy on which any creditor's petition could be premised, and therefore
C the judgment creditor correctly sought the withdrawal of the bankruptcy proceedings.

ANALYSIS

D [6] The reliance on *Re Subramaniam a/l Paidathally; ex parte G Ragumaren & Co* [2011] MLJU 1216; [2011] 1 LNS 1594 ('Subramaniam') is, with respect somewhat misplaced. *Subramaniam's* case relies on *Re Ng Kai Tee, ex parte CIMB Bank Bhd* (Bankruptcy Proceedings No 29–71 of 2009–11) (unreported) where it was held that it was not possible to file a second creditor's
E petition even where the bankruptcy act was not spent. However, it is pertinent in both *Ng's* case as well as *Subramaniam's* case that:

- (a) there was an act of bankruptcy that could be relied upon without dispute;
- F (b) in *Ng's* case there was a *discontinuance* of the creditor's petition — meaning that the judgment creditor no longer sought to continue with the entirety of the bankruptcy proceedings. Having chosen to discontinue the bankruptcy proceedings, it was not open to the judgment creditor to renege or reprobate from its earlier stance, which
G was final in nature. That is not the case here; and
- (c) *Subramaniam's* case relies on the reasoning in *Ng's* case, although the issue in the former, ie *Subramaniam's* case, was different. The issue was whether a second creditor's petition based on the same act of bankruptcy could in fact be filed, due to an error in the statement of the date of the
H act of bankruptcy. However, in that case, there was no appeal against the first decision disallowing the creditor's petition, due to the mistake in the statement of the date of the act of bankruptcy. So the filing of the second creditor's petition could be viewed, arguably, as trying to have the same
I matter heard again.

[7] The case also went on to hold that a termination of a creditor's petition amounted to a termination of the entirety of the proceedings. The latter point ought to be viewed with circumspection because the existence of a

typographical error, for example, or an inadvertent mistake ought not to have the severe and far-reaching effect of conclusively bringing to an end the entirety of the bankruptcy proceedings.

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[8] For example, an inadvertent erroneous statement of the quantum, or even an inadvertent statement of the incorrect date in the body of the creditor's petition should not *automatically* warrant a striking out, and thereby a termination of the entirety of the bankruptcy proceedings.

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[9] In this context the purpose and intent of the Insolvency Act and its Rules is significant. The purpose of bankruptcy proceedings is to safeguard the estate of the judgment debtor to ensure that there is no unnecessary or wrongful dissipation of assets in the interests of the creditors as a whole. In other words, such securing of the estate is for the benefit of the creditors as a whole. Therefore, while it is trite that the nature of bankruptcy proceedings is penal in nature, the interests of the creditors as a whole also require consideration. It is a balance, which lies in weighing up the harshness of the bankruptcy law against the genuine interests of creditors whose chances of recovery will be greatly diminished by unlawful dissipation of the judgment debtor's assets. In this context, if bankruptcy proceedings are delayed on grounds that are not substantive, but merely typographical or inadvertent, the interests of the creditors as a whole will be adversely affected. This is a factor that also requires consideration.

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[10] Put in this perspective, it is apparent that to require a judgment creditor to embark on the whole process of initiating bankruptcy proceedings afresh, by reason of a typographical or inadvertent error does not serve the purpose and intent of the Act, but conversely, results in considerable delay and expense and more significantly dissipation of the judgment debtor's estate, leaving little to no recourse for other creditors. For this reason, each case ought to be perused with care and caution to ascertain whether the error in the creditor's petition is substantive, going to the root of the act of bankruptcy or to the viability of the creditor's petition, or on the other hand an error that is capable of remedy by reason that it is de minimis and/or inadvertent, and causes no substantive prejudice to the judgment debtor.

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[11] It should therefore be open to the court based on the facts of any particular case, on an application for amendment, to correct an error where it is suitable to do so, resulting in the creditor's petition being heard and disposed of. The court certainly possesses the jurisdiction to do so. This exercise of discretion will be premised on the established principles of the exercise of a discretion judicially, as well as the Insolvency Act.

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A [12] As to whether the termination of a creditor's petition terminates the entirety of the bankruptcy proceedings, this is most likely the case if the matter is heard and disposed of on its merits. Such a decision may be appealed upon, and any final adjudication on the matter would be determinative of such termination. Again, the term 'termination' ought to reflect the adjudication of
B the creditor's petition on its merits for the reasons set out above.

C [13] As for the decision cited this morning by counsel for the appellant, *Re V Gopal: ex p; Bank Buruh (M) Bhd* [1987] CLJ Rep 602 and *Hong Leong Bank Bhd v Khairulnizam bin Jamaludin* [2016] 4 MLJ 302 seemingly for the position that bankruptcy proceedings only commence upon the filing of the creditor's petition and therefore must cease when it is withdrawn, we are unable to agree with learned counsel because:

- D (a) with regards to *V Gopal*, counsel relied on one sentence in the penultimate paragraph of the judgment, 'It is the filing of the petition that commences the bankruptcy proceedings'. The issue in that case was whether an act of bankruptcy could be said to have been committed where s 3(1)(i) of the Bankruptcy Act 1967 was relied on but where the bankruptcy notice was caused to be issued a few days before six years had
E lapsed from the date of the relevant final judgment, and which notice was only served a few days after the six year period lapsed. That had no relevance in the instant appeal. It certainly cannot comprise authority for the proposition that because bankruptcy proceedings commence on
F the filing of a petition, the withdrawal of the same necessarily determinatively brings to an end bankruptcy proceedings, particularly where the withdrawal is made to correct a formal error or where no act of bankruptcy subsists as is the case in this appeal. This is because the court's bankruptcy jurisdiction allows it to review, amend and correct a
G petition. In the instant appeal, the creditor's petition is a non-starter as there can be no commencement of bankruptcy proceedings without an act of bankruptcy subsisting. Therefore the withdrawal of the same cannot have the effect of bringing to an end non-existent proceedings;
- H (b) the citation of *Khairulnizam* was also of no assistance as that case deals with s 5 of the Bankruptcy Act 1967, more particularly s 5(3). Reliance was placed on para 34 of the judgment dealing with the definition of bankruptcy action where the court held that the words 'bankruptcy action' in s 5(3) of the Act has to be read as 'bankruptcy petition'. Again
I this does not mean that the withdrawal of a bankruptcy petition necessarily equates to a cessation of the proceedings, particularly where liberty to file afresh is granted by the court;
- (c) both those cases were decided in the context of their factual matrices and the provisions arising there. Our case is different as no act of bankruptcy

has occurred to base a petition on, and there could have been no act of bankruptcy as the setting aside application had not yet been heard;

- (d) perhaps most importantly, counsel referred to the non-hearing of the application to set aside the bankruptcy notice as a 'red herring'. We fail to comprehend how this crucial issue can be a red herring when r 93 specifically requires a setting aside application to be disposed of before an act of bankruptcy can be declared. Pending this, no act of bankruptcy can be deemed to have been committed; and

- (e) we note that the points of law and authorities raised this morning are neither in the written submissions and no notice of the same was accorded to the court or opposing counsel. This is not good practice. Fair play and substantive justice requires that notice of new arguments taken at the oral hearing and the filing of new authorities be given to the court and opposing counsel, and highlighted expressly to both.

[14] Finally, s 6(7) of the Insolvency Act stipulates that a creditor's petition cannot be withdrawn without the leave of the court. This fortifies our rationale that a creditor's petition can be withdrawn without the entire proceedings necessarily coming to an end. The bankruptcy jurisdiction of the High Court accords wide powers to impose any condition on withdrawal, including liberty to file afresh.

THE APPEAL

[15] Reverting to the present appeal, the situation is entirely different as correctly pointed out by the Court of Appeal, because there is simply no act of bankruptcy at all on which any creditor's petition could be premised. Therefore, the withdrawal was correctly undertaken with the saving that it could be filed again. And this in turn is correct because it is not a 'second bite at the cherry' as the setting aside application has not been heard and any declaration of an act of bankruptcy is simply invalid and in contravention of the Act and Insolvency Rules. In this context we rely on the case of *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298:

In passing, we wish to emphasise that contrary to what had been expressed in *Soh Bok Yew*, if a bankruptcy petition is to be founded on an act of bankruptcy based on a failure to comply with a bankruptcy notice, it is self-evident that such a petition can only be filed after the application to set aside the bankruptcy notice is heard and dismissed.

[16] We do not think it necessary to answer the questions of law put forward for our consideration.

A [17] For these reasons we are of the view that the appeal has no merits and it is dismissed with costs of RM30,000 to the respondent subject to allocatur.

Appeal dismissed with costs.

B Reported by Nabilah Syahida Abdullah Salleh

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